

21.) Plaintiff alleged disability due to lung disease, cancer, diabetes, and mental impairments (including attention deficit disorder), with an onset date of February 21, 2000. (Tr. 54-57, 73, 86, 168.) Benefits were denied initially and on reconsideration. (Tr. 45-52, 61-62.) Plaintiff requested a hearing before an administrative law judge (ALJ), which was held before ALJ Riley Atkins on September 21, 2006. (Tr. 478-510.) At the hearing, Plaintiff, who was represented by counsel, testified. The ALJ denied benefits and the Appeals Council denied review. (Tr. 6-9, 21-30.) The instant matter is before this court pursuant to 42 U.S.C. § 405(g).

STATEMENT OF FACTS

The facts of the case are set forth in detail in the transcript of proceedings, and are briefly summarized here. Plaintiff was 26 years old at onset and 33 at the time of the hearing. (Tr. 481.) It is unclear whether Plaintiff completed the ninth or the eleventh grade. (Tr. 92, 483.) Plaintiff has no past relevant work. (Tr. 25, 166.) The ALJ found Plaintiff disabled. (Tr. 21.) After performing analysis pursuant to *Bustamante v. Massanari*, 262 F.3d 949 (9th Cir. 2001), the ALJ determined that substance abuse is a contributing factor material to disability. Accordingly, Plaintiff was found not eligible for benefits. (Tr. 21.)

SEQUENTIAL EVALUATION PROCESS

The Social Security Act (the "Act") defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve

1 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also
2 provides that a Plaintiff shall be determined to be under a
3 disability only if any impairments are of such severity that a
4 Plaintiff is not only unable to do previous work but cannot,
5 considering Plaintiff's age, education and work experiences, engage
6 in any other substantial gainful work which exists in the national
7 economy. 42 U.S.C. §§ 423 (d)(2)(A), 1382c(a)(3)(B). Thus, the
8 definition of disability consists of both medical and vocational
9 components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir.
10 2001).

11 The Commissioner has established a five-step sequential
12 evaluation process for determining whether a person is disabled. 20
13 C.F.R. §§ 404.520, 416.920. Step one determines if the person is
14 engaged in substantial gainful activities. If so, benefits are
15 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
16 the decision maker proceeds to step two, which determines whether
17 Plaintiff has a medically severe impairment or combination of
18 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

19 If Plaintiff does not have a severe impairment or combination
20 of impairments, the disability claim is denied. If the impairment
21 is severe, the evaluation proceeds to the third step, which compares
22 Plaintiff's impairment with a number of listed impairments
23 acknowledged by the Commissioner to be so severe as to preclude
24 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(ii),
25 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P, App. 1. If the
26 impairment meets or equals one of the listed impairments, Plaintiff
27 is conclusively presumed to be disabled. If the impairment is not
28 one conclusively presumed to be disabling, the evaluation proceeds

1 to the fourth step, which determines whether the impairment prevents
2 Plaintiff from performing work which was performed in the past. If
3 a Plaintiff is able to perform previous work, that Plaintiff is
4 deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),
5 416.920(a)(4)(iv). At this step, Plaintiff's residual functional
6 capacity ("RFC") assessment is considered. If Plaintiff cannot
7 perform this work, the fifth and final step in the process
8 determines whether Plaintiff is able to perform other work in the
9 national economy in view of Plaintiff's residual functional
10 capacity, age, education and past work experience. 20 C.F.R. §§
11 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137
12 (1987).

13 The initial burden of proof rests upon Plaintiff to establish
14 a prima facie case of entitlement to disability benefits. *Rhinehart*
15 *v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172
16 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is met once
17 Plaintiff establishes that a physical or mental impairment prevents
18 the performance of previous work. The burden then shifts, at step
19 five, to the Commissioner to show that: (1) Plaintiff can perform
20 other substantial gainful activity, and (2) a "significant number of
21 jobs exist in the national economy" which Plaintiff can perform.
22 *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

23 Plaintiff has the burden of showing that drug and alcohol
24 addiction ("DAA") is not a contributing material factor to
25 disability. *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001).
26 The Social Security Act bars payment of benefits when drug addiction
27 and/or alcoholism is a contributing factor material to a disability
28 claim. 42 U.S.C. §§ 423 (d)(2)(C) and 1382(a)(3)(J); *Sousa v.*

1 *Callahan*, 143 F.3d 1240, 1245 (9th Cir. 1998). If there is evidence
2 of DAA and the individual succeeds in proving disability, the
3 Commissioner must determine whether DAA is material to the
4 determination of disability. 20 C.F.R. §§ 404.1535 and 416.935. If
5 the ALJ finds that the claimant is not disabled, then the claimant
6 is not entitled to benefits and there is no need to proceed with the
7 analysis to determine whether DAA is a contributing factor material
8 to disability. However, if the ALJ finds that the claimant is
9 disabled and there is medical evidence of drug addiction or
10 alcoholism, then the ALJ must proceed to determine if the claimant
11 would be disabled if he or she stopped using alcohol or drugs.
12 *Bustamante v. Massanari*, 262 F.3d 949 (9th Cir. 2001).

13 STANDARD OF REVIEW

14 Congress has provided a limited scope of judicial review of a
15 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
16 the Commissioner's decision, made through an ALJ, when the
17 determination is not based on legal error and supported by
18 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th
19 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
20 "The [Commissioner's] determination that a plaintiff is not disabled
21 will be upheld if the findings of fact are supported by substantial
22 evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983)
23 (*citing* 42 U.S.C. § 405(g)). Substantial evidence is more than a
24 mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th
25 Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*,
26 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of*
27 *Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988).
28 Substantial evidence "means such evidence as a reasonable mind might

1 accept as adequate to support a conclusion." *Richardson v. Perales*,
2 402 U.S. 389, 401 (1971)(citations omitted). "[S]uch inferences and
3 conclusions as the [Commissioner] may reasonably draw from the
4 evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289,
5 293 (9th Cir. 1965). On review, the court considers the record as
6 a whole, not just the evidence supporting the decision of the
7 Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir.
8 1989)(quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

9 It is the role of the trier of fact, not this court, to resolve
10 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
11 supports more than one rational interpretation, the court may not
12 substitute its judgment for that of the Commissioner. *Tackett*, 180
13 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
14 Nevertheless, a decision supported by substantial evidence will
15 still be set aside if the proper legal standards were not applied in
16 weighing the evidence and making the decision. *Browner v. Secretary*
17 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).
18 Thus, if there is substantial evidence to support the administrative
19 findings, or if there is conflicting evidence that will support a
20 finding of either disability or nondisability, the finding of the
21 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
22 1230 (9th Cir. 1987).

23 ADMINISTRATIVE DECISION

24 At step one, the ALJ found Plaintiff had not engaged in
25 substantial gainful activity during the relevant time. (Tr. 23.)
26 At step two, he found Plaintiff had severe impairments of history of
27 Langerhans cell histiocytosis (LCH), methamphetamine dependence,
28 methamphetamine-induced mood disorder, diabetes insipidus, attention

1 deficit hyperactivity disorder, and nicotine abuse. (Tr. 23.) At
2 step three, he determined these impairments did not meet the
3 requirements of any Listed impairments. (Tr. 23.) He found
4 Plaintiff less than completely credible. (Tr. 26-27.) The ALJ
5 found that when substance abuse is included, Plaintiff is disabled
6 because she is "unable to meet the demands of even sedentary work on
7 a regular and continuing basis." (Tr. 25.) The ALJ included in his
8 RFC "unpredictable absences 2 or more days per month." (Tr. 24.)
9 He found that if substance abuse stops, Plaintiff has the RFC for
10 the full range of unskilled sedentary work. (Tr. 29.) At step
11 four, the ALJ found that because Plaintiff has no past relevant
12 work, she is unable to perform it. At step five, applying Medical
13 Vocational Rule 201.24, the ALJ found that without substance abuse,
14 there is work Plaintiff can perform resulting in a finding of "not
15 disabled" within the meaning of the Social Security Act. (Tr. 29.)
16 The ALJ determined that substance abuse is a contributing factor
17 material to determining Plaintiff's disability. (Tr. 29.) The ALJ
18 found Plaintiff was, therefore, not eligible for benefits. (Tr.
19 29.)

20 ISSUES

21 The question is whether the ALJ's decision is supported by
22 substantial evidence and free of legal error. Plaintiff argues the
23 ALJ erred in weighing the medical evidence and in relying on the
24 Medical Vocational Guidelines (Grids) at step five. (Ct. Rec. 14 at
25 14.) The Commissioner responds that the ALJ properly weighed the
26 medical evidence and his decision is free of legal error, including
27 his step five analysis. (Ct. Rec. 16 at 19-20.)
28

1 **DISCUSSION**

2 **A. Weighing Medical Evidence**

3 Plaintiff argues that the ALJ erred by failing to properly
4 credit the opinions of treating physicians family practitioner Ray
5 FitzSimmons, M.D., oncologist Craig Nichols, M.D., and psychiatrist
6 Kimberly Humann, M.D. (Ct. Rec. 14 at 16-19.) The Commissioner
7 responds that the ALJ gave specific and legitimate reasons,
8 supported by substantial evidence, for rejecting some of these
9 opinions. (Ct. Rec. 16 at 12-16.)

10 On September 17, 2003, Dr. FitzSimmons assessed marked
11 impairment caused by LCH, moderate to marked impairment caused by
12 pulmonary fibrosis, and mild impairment due to diabetes insipidus.
13 (Tr. 220.) He estimated that Plaintiff will be unable to work at
14 least half-time in a normal setting "probably forever," and opined
15 that treatment is unlikely to restore Plaintiff's ability to work at
16 least half-time. (Id.) Dr. FitzSimmons opined that Plaintiff
17 "certainly qualifies for" disability benefits and suspected she
18 needed help with substance abuse treatment. (Tr. 220, 223.)

19 Over a year later, on November 19, 2004, Dr. FitzSimmons opined
20 that LCH and pulmonary fibrosis caused marked impairment; diabetes
21 insipidus, moderate impairment. (Tr. 378.) He did not recommend
22 substance abuse treatment. (Tr. 379.) Dr. FitzSimmons estimated
23 that Plaintiff's limitations were "life long" and she is not
24 employable. (Id.) He opined Plaintiff "has a very serious
25 disabling disease which is destroying her lungs." (Id.) About
26 nineteen months later, on June 14, 2006, Dr. FitzSimmons again
27 opined that Plaintiff is not employable. (Tr. 397.)

28 The ALJ observed that Dr. FitzSimmons, among other treating

1 physicians, opined Plaintiff "is incapable of meeting the demands of
2 competitive work on a regular and continuing basis." (Tr. 25.) The
3 ALJ noted that these assessments are consistent with Plaintiff's
4 functioning while using drugs "and are given significant weight."
5 (*Id.*) As noted, the ALJ found Plaintiff disabled when substance
6 abuse is included. (Tr. 23-24.)

7 Dr. Humann evaluated Plaintiff on February 16, 2006.¹ (Tr.
8 389.) Plaintiff stated she had been substance-free for 90 days. She
9 was organizing AA groups, attending church about four times a week,
10 and attending a weekly recovery group. (Tr. 389.) Plaintiff
11 described long-term problems with impulsivity. The group leader in
12 at Plaintiff's weekly treatment group described Plaintiff as quite
13 restless and often interrupting others. (Tr. 389.) Plaintiff was
14 awaiting a second round of chemotherapy. (Tr. 390.) Dr. Humann
15 initially assessed attention deficit hyperactivity disorder (ADHD)
16 and amphetamine dependence, with a GAF of 55.² (Tr. 391.) She
17 prescribed medication for ADHD. (*Id.*)

18 About three years later, treating psychiatrist Dr. Humann's
19 April 20, 2006, opinion stated:

20 _____
21 ¹Dr. Humann points out that Plaintiff began treatment at her
22 clinic in September of 2003. (Tr. 406.)

23 ² A Global Assessment of Functioning (GAF) of 55 indicates
24 moderate symptoms (e.g., flat affect and circumstantial speech,
25 occasional panic attacks) or moderate difficulty in social,
26 occupational or school functioning (e.g., few friends, conflicts
27 with peers or co-workers. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL
28 DISORDERS, 4th Ed., (DSM-IV), at 32.

1 She is continuing to be active in her church and active in
2 her recovery group. . . .

3 . . . Psychomotor excited fidgety. Mood depressed.
4 Affect not congruent with stated mood. Bright,
5 superficial; however, at one point she did become more
6 serious and almost tearful. Thought process tangential.
7 At times is difficult to follow.

8 (Tr. 388.) Dr. Humann diagnosed methamphetamine-induced mood
9 disorder and attention deficit disorder. She assessed a current GAF
10 of 50, prescribed an antidepressant, and authorized psychotherapy.

11 (Tr. 388.) Six months later Dr. Humann opined that Plaintiff was
12 unable to meet competitive work standards in seven areas, including
13 maintaining regular attendance and dealing with normal stress. (Tr.
14 464.)

15 The ALJ pointed out Dr. Humann opined Plaintiff is incapable of
16 meeting the demands of competitive work on a regular and continuing
17 basis, an assessment consistent with Plaintiff's functioning while
18 using drugs. (Tr. 25.)

19 On October 19, 2006, treating oncologist Craig Nichols, M.D.,
20 opined Plaintiff is limited to less than sedentary work as a result
21 of poor pulmonary function, chest pain and obesity. (Tr. 460-463.)
22 The ALJ noted Dr. Nichols's opinion is consistent with Plaintiff's
23 functioning while using drugs; the opinion was given significant
24 weight. (Tr. 25.)

25 The ALJ found that if Plaintiff stopped abusing substances, she
26 would have the RFC to lift ten pounds, stand and walk two hours out
27 of eight and sit at least six hours out of eight. Plaintiff's
28 psychological impairments were found to limit her to unskilled work.
(Tr. 26.)

Despite the ALJ's statement that he gave Dr. FitzSimmons's

1 opinion significant weight (Tr. 25), he also opined:

2 As for the opinion evidence, Ray FitzSimmons, M.D.,
3 a treating physician, opined in May 2003 the claimant
4 could not participate in employment readiness classes, job
5 search, or employment (Exhibit 6F-55). *In September 2003*
6 *he opined that claimant was capable of sedentary work on*
7 *at least a half-time basis (Exhibit 6F-58).*³ In
8 November 2004 he opined she was not employable (Exhibit
9 9F-191-196). He again opined she was unemployable in June
10 2006 due to progressive lung disease (Exhibit 11F-216).
11 The assessments of Dr. FitzSimmons appear designed to
12 advocate for the claimant in order for her to receive
13 medical or other benefits. They are in conflict with the
14 treatment records of Dr. Nichols, a specialist who has
15 treated the claimant's lung disease and has repeatedly
16 described her condition as stable. The opinion of Dr.
17 FitzSimmons is given little weight.

18 (Tr. 27-28.) (Emphasis added.)

19 As indicated, Dr. Nichols opined in October of 2006 that
20 Plaintiff has the RFC for less than sedentary work - meaning she is
21 disabled. (Tr. 460-463.) The ALJ erred by finding Dr.
22 FitzSimmons's opinion in conflict with that of Dr. Nichols, because
23 the finding is not supported by the record. The ALJ's rejection of
24 Dr. FitzSimmons's opinion as "advocacy" for his patient is not
25 supported by the record.

26 The ALJ found Dr. Nichol's RFC consistent with Plaintiff's
27 functioning when using drugs but "not otherwise supported by his
28 treatment records." (Tr. 28.) The ALJ's sole reason for rejecting
29 Dr. Nichols's October 2006 opinion is a perceived inconsistency
30 between the opinion and treatment notes using the "Eastern

31 ³ The ALJ did not indicate that in his September 17, 2003,
32 opinion, Dr. FitzSimmons opined Plaintiff would be unable to perform
33 at least half-time in a normal day-to-day work setting "probably
34 forever." (Exhibit 6F-58 at Tr. 221.)

1 Cooperative Oncology Group Performance Status scale" in treatment
2 notes dated (1) May, August and September 2000; (2) February, March
3 and October 2001; (3) January, February and October 2002; (4) June
4 and July 2003; (5) March and April 2004; (6) January, March, May and
5 June 2005; and (7) February, May and June 2006. (Tr. 28.) The ALJ
6 opines that on each of these dates, Dr. Nichols assessed a
7 performance status of between 0 and 1, meaning an individual who at
8 most is restricted from physically strenuous activity but ambulatory
9 and able to carry out work of a light "or sedentary nature, e.g.,
10 light house work, office work." (Tr. 28, referring to Exhibits 7F,
11 8F, and 15F.)

12 It is difficult to see how the ALJ determined that Dr.
13 Nichols's perceived inconsistencies supported finding Plaintiff
14 disabled when using substances but able to work when substance free.
15 The ALJ's sole reason for discounting Dr. Nichols's October 2006
16 opinion is not clear and convincing.

17 With respect to Dr. Humann's opinion, the ALJ notes that in
18 August of 2006, she opined Plaintiff was unable to work full time
19 because she has great difficulty staying focused, working with
20 others, and dealing with authority figures; when under stress,
21 Plaintiff was likely to have a relapse in symptoms, and, when
22 coupled with her physical illness, it was unlikely Plaintiff would
23 be able to hold a job. (Tr. 28, referring to Tr. 406-407.) The ALJ
24 observed that in October of 2006, Dr. Humann opined Plaintiff is
25 unable to maintain attention for two-hour segments, work in
26 coordination with or in proximity to others, complete a normal
27 workday or workweek, accept instructions from supervisors, get along
28 with co-workers, and deal with normal work stress. (Tr. 28,

1 referring to Tr. 464.) The ALJ summarily rejected Dr. Humann's
2 conclusions, stating: "Dr. Humann's conclusion the claimant is
3 unlikely to hold a job addresses the claimant's physical condition
4 and vocational issues of which she has no expertise. It is given
5 little weight in assessing the claimant's functioning in the absence
6 of drug use." (Tr. 28.)

7 The only evidence relied on by the ALJ to determine that
8 Plaintiff is not disabled when substance-free is her "active
9 lifestyle," described as the ability to attend church services and
10 bible studies four times a week, organize an AA group, and attend
11 treatment--all for an unspecified period of time. (Tr. 28,
12 referring to Exhibit 10F-201.) While it is well-established that
13 the nature of daily activities may be considered when evaluating
14 credibility (and exertion levels), many home activities are not
15 transferable to the "more grueling" environment of the workplace,
16 where it might be impossible to rest or take medication. *Fair v.*
17 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). Similarly, an ability to
18 attend self-help groups and treatment several times weekly does not
19 clearly translate to the ability to function adequately in the "more
20 grueling" environment of the workplace, particularly when the
21 treating psychiatrist opines that Plaintiff's psychological
22 impairments render her unable to maintain full-time employment.

23 While the ALJ purports to reject Dr. Humann's opinion because
24 it "addresses the claimant's physical condition and vocational
25 issues of which she has no expertise" (Tr. 28), Dr. Humann clearly
26 opined in August of 2006: "Ms. Miner's mental disorders limit her
27 ability to fully participate in work related activities at this
28 time." (Tr. 466.) As indicated, Dr. Humann assessed a GAF of 55

1 and noted psychological impairment when Plaintiff had been free of
2 substance abuse for 90 days.

3 The ALJ fails to adequately reject treating psychiatrist Dr.
4 Humann's assessed moderate and marked limitations. The RFC for
5 unskilled work does not adequately address vocational limitations
6 in the ability to deal with normal work stress, to complete a normal
7 work day or work week, or to maintain attention for two-hour
8 segments, issues well within Dr. Humann's expertise. To the extent
9 the ALJ rejected these limitations as inconsistent with Plaintiff's
10 functioning when drug free, the reason is not supported by the
11 record.

12 **B. Remand**

13 There are two remedies where the ALJ fails to provide adequate
14 reasons for rejecting the opinions of a treating or examining
15 psychologist or physician. The general rule, found in the *Lester*
16 line of cases, is that "we credit that opinion as a matter of law."
17 *Lester*, 81 F.3d at 834; *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th
18 Cir. 1990); *Hammock v. Bowen*, 879 F.2d 498, 502 (9th Cir. 1989).
19 Under the alternate approach found in *McAllister, supra*, a court may
20 remand to allow the ALJ to provide the requisite specific and
21 legitimate reasons for disregarding the opinion. *See also Benecke*,
22 379 F.3d at 594 (court has flexibility in crediting testimony if
23 substantial questions remain as to claimant's credibility and other
24 issues). Where evidence has been identified that may be a basis for
25 a finding, but the findings are not articulated, remand is the
26 proper disposition. *Salvador v. Sullivan*, 917 F.2d 13, 15 (9th Cir.
27 1990)(citing *McAllister*); *Gonzalez v. Sullivan*, 914 F.2d 1197, 1202
28 (9th Cir. 1990).

1 All of Plaintiff's treating physicians opine that she is unable
2 to maintain full-time employment. The record does not support the
3 ALJ's finding that when substance abuse is excluded, Plaintiff is
4 able to maintain competitive employment. Accordingly, remand will
5 only serve to delay the receipt of benefits.

6 **CONCLUSION**

7 The ALJ's RFC is not supported by substantial evidence and free
8 of legal error. The ALJ's reasons for rejecting the opinions of all
9 of Plaintiff's treating physicians are not based on substantial
10 evidence and are not free of legal error. Accordingly,

11 **IT IS ORDERED:**

12 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
13 **GRANTED**. The matter is **remanded** to the Commissioner for an
14 immediate award of benefits.

15 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**) is
16 **DENIED**.

17 3. An application for attorney fees may be filed by separate
18 motion.

19 The District Court Executive is directed to file this Order and
20 provide a copy to counsel for Plaintiff and Defendant. Judgment
21 shall be entered for Plaintiff and the file shall be **CLOSED**.

22 DATED August 4, 2008.

23
24 S/ CYNTHIA IMBROGNO
25 UNITED STATES MAGISTRATE JUDGE
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27
28